COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-192999

MAY 22 1979

The Honorable Pete V. Domenici
United States Senate

Dear Senator Domenici:

You recently requested our opinion concerning the rights of the States with respect to jurisdiction over nuclear waste repositories. In your letter of February 26, 1979 to the Secretary of Energy, you suggest that a nuclear waste repository requires exclusive Federal jurisdiction; that the only way the Federal Government can get such jurisdiction over State property is by purchase with the State legislature's consent (or by State legislative cession); and that the State can make its consent conditional and the Secretary of Energy can agree to any conditions so imposed. Based upon these premises, you suggest that an agreement between the Secretary of Energy and a State, which would permit the State to veto the establishment of a nuclear waste repository within its boundaries, would be valid and enforceable.

In a letter to Chairman John D. Dingell, House Subcommittee on Energy and Power (B-164105, June 19, 1978), we expressed the view that in the absence of specific statutory authority, an agreement by the Secretary of Energy with a State to make his Department's choice of a nuclear waste repository site subject to rejection or disapproval by the State is legally unenforceable. In determining that no statutory authority existed, we relied upon the rejection of an amendment offered by Senator George McGovern to the Energy Reorganization Act of 1974, which would have prohibited contracting for or construction of a radioactive waste storage facility if the State legislature or the people of the State by referendum, disapproved of the use of a particular site in that State. This amendment was not acted upon. No provision in the Department of Energy Organization Act, which was subsequently enacted, supports the right of a State to "veto" a nuclear waste repository with authority given to it by the Department of Energy.

You feel, however, that there is a constitutional basis for State concurrence in the use of a site as a nuclear waste facility. You submit that this basis is found in Article I, Section 8, Clause 17 of the United States Constitution, which states that the Congress has power--

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may,

> by cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *."

You interpret this provision as requiring that before the Federal Government may acquire exclusive jurisdiction over property within a State, it must have the consent of the State legislature.

It is your position that a nuclear waste repository would qualify under the heading of "other needful Buildings," as used in Clause 17. Therefore, in your view, the Federal Government would have to obtain the State's consent in order to have exclusive jurisdiction over land it obtains for such a purpose.

In giving consent to acquisition of property under Clause 17, a State legislature may attach conditions which would enable it to retain certain rights with respect to the property in question . Among such conditions may be, for example, the right of taxation or a reversionary right to the property if it is no longer used for its originally intended purpose. The State could thus withhold its consent to the acquisition or condition the consent in some way.

You further suggest that the Congress has preempted the area of nuclear regulation so as to prevent a State from exercising any jurisdiction over a nuclear project within its boundaries. Thus, if a nuclear waste repository were established within the boundaries of a State, by its very nature it would require exclusive Federal jurisdiction. The consent of the State would have to be obtained prior to the acquisition of State land for the repository, in order that the action of the Federal Government would not contravene Article I, Section 8, Clause 17 of the United States Constitution. It is your conclusion that a State could, in effect, prevent the establishment of a nuclear waste repository within its boundaries by withholding consent to exclusive Federal jurisdiction.

If, as you maintain, a Federal nuclear project can only be established in a State on the basis of exclusive Federal jurisdiction over land acquired under Clause 17, we agree that a State could prevent the establishment of such a project by making it a condition of its consent that the property not be used for nuclear

waste repository purposes. You suggest that the existence in the State of this power "validates" an agreement between the State and the Secretary of Energy giving the State a veto power over waste repository siting, presumably because if the Secretary does not consent to such an arrangement, the State can prevent the establishment of the site by withholding or conditioning its consent under Clause 17.

We are unable to accept your major premise on which this conclusion rests. We do not agree that by its very nature, a nuclear waste repository must be located on land under exclusive Federal jurisdiction. You correctly point out that acquisition of land by the Federal Government without the consent of the State in which the land is located does not confer upon the Federal Government exclusive legislative jurisdiction under Clause 17. However, the United States can obtain sufficient jurisdiction over the land for its purposes under other constitutional authority.

There is no question that the Federal Government has the absolute right to acquire land it needs through the process of eminent domain. As Mr. Justice Strong stated in Kohl v. United States, 91 U.S. 367, 371 (1875):

> "The powers vested by the Constitution in the general government demand for their exercise the acquisition of land in all the States. * * * If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. * * *" (Emphasis added.)

Thus, with or without the consent of a State, the United States can obtain land within that State for its use.

Although it has been suggested that when the United States obtains land from a State without its consent, it has only the rights of an ordinary proprietor with respect to that land and cannot exercise exclusive jurisdiction over it (Paul v. United States, 371 U.S. 245 (1963)), the Supreme Court has said recently that such a statement confuses the derivative legislative power of Congress with its powers under the Property Clause. Kleppe v. New Mexico, 426 U.S. 529, 541-42; reh. den. 429 U.S. 873 (1976). Under Article I, Section 8, Clause 17, Congress can obtain exclusive or partial jurisdiction over land obtained

with a State's consent, as discussed above. These are Congress' derivative powers. In the event consent is not obtained, however, the Congress can still obtain the necessary jurisdiction under the Property Clause. In Kleppe, Mr. Justice Marshall discussed this issue and stated:

> "But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. [citations omitted] And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const, Art VI, cl 2. [citations omitted] As we said in Camfield v. United States, 167 U.S. at 526, in response to a somewhat different claim: 'A different rule would place the public domain of the United States completely at the mercy of state legislation'."

426 U.S. 542-3.

We understand Clause 17 to say that if lands are acquired for specified purposes through State consent, then the Federal government may exercise exclusive jurisdiction. However, we find no reason for concluding further that the only way by which the United States may acquire lands for such purposes is through Clause 17 and conversely that a fort, magazine, or arsenal could not be established on land over which the United States does not exercise exclusive jurisdiction.

We have found no precedent for such an interpretation. In practice, moreover, the Congress has provided that land for munitions plants--which are analogous to arsenals or magazines--may be acquired by condemnation or by gift. 10 U.S.C. § 2663 (1976). As for forts, it is the policy of the Department of the Army not to acquire any degree of legislative jurisdiction when it acquires lands. Army Regulation 405-20, sections 5 and 6.

There is another difficulty with the argument that land for a nuclear waste repository must be under exclusive Federal jurisdiction and therefore must be acquired through the Clause 17 procedure.

Clause 17, as you acknowledge, is authority for acquisition of land for public works of many kinds, not merely those, like forts or nuclear waste repositories, which you describe as "a necessary project, national in scope and essential to the safety of the republic." See James v. Dravo, 302 U.S. 134 (1937). Clause 17 makes no distinction as to the method of acquisition between forts and arsenals, on the one hand, and "other needful buildings," on the other. It follows that if Clause 17 requires exclusive jurisdiction, it requires it with regard to all properties acquired, and not merely those for military or defense purposes. Again, however, it seems clear that the United States may choose whether to acquire land for the many purposes for which it may do so, under Clause 17 or as a proprietor.

We have found little judicial authority on this point. Although it was not at issue in the case and therefore is not entitled to full weight as a precedent, a discussion of this point in one case does support our conclusion. In United States v. Stahl (27 F. Cas. 1288 (C.C.D. Kan. 1868) (No 16, 373)), the court discussed whether the United States could erect and occupy a fort without the consent of the State legislature. The court said that whether the Constitution requires State consent "may well be doubted." The court thought it improbable that the framers of the Constitution,

> "who conferred on congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the federal government was established for the express purpose of providing for the common defense, would have left its power of erecting forts, so important to the execution of that purpose, subject to the volition of state legislatures."

The court went on to say that consent of the State is necessary to confer exclusive jurisdiction on the United States, but that "All the important uses of a fort, arsenal, or magazine could be secured without the exercise of exclusive legislation within their walls." We agree, and believe that the point applies with equal force to nuclear waste repositories.

We conclude that exclusive jurisdiction, obtained pursuant to Article 1, Section 8, Clause 17 is not necessary to establish nuclear waste repositories. In this connection, you contend that the Congress has preempted all regulation of any nuclear project by enacting the Atomic Energy Act and therefore, only exclusive legislative jurisdiction will serve the purposes of the United States. Preemption means that the State may not act either when to do so would interfere with existing

Federal authority, or when, although the Federal Government has not acted, the subject demands single, unified, control. Wabash Railway Co. v. Illinois, 118 U.S. 557 (1886). We find nothing in the nature of atomic waste storage or in the Atomic Energy Act to support the conclusion that there is no room for any State authority over sites chosen for such storage.

The Federal Government also has authority, under the doctrine of preemption, to regulate nuclear projects. Northern States Power Company v. Minnesota, 447 F. 2d 1143 (8th Cir. 1971) affirmed mem. 405 U.S. 1035 (1972). The Congress would have the power, under the Property Clause, for purposes of such regulation, to enact legislation controlling any property it obtains for such a purpose and, under the Supremacy Clause, this would override any conflicting State laws. But the State may continue to act in areas not impinging on the Federal regulation of nuclear projects just as, for example, State civil and criminal laws may apply within a fort. See Army Regulation 405-20, supra.

In summary, we reiterate our earlier position discussed supra, as expressed in our June 19, 1978 letter to Chairman Dingell, that the Secretary of Energy has no authority to provide through agreement with a State, a veto power over his Department's designated sites for nuclear waste storage, in the absence of specific legislative authority; since such a veto agreement is not necessary in order for him to carry out his statutory mandate to establish nuclear waste storage facilities. We note that H. R. 2762, introduced on March 8, 1979, proposes to amend the Atomic Energy Act of 1954 in order to provide for a formal process of State participation and concurrence with respect to the management and storage of radioactive waste. This bill also provides that

> "No Federal agency or its representative shall proceed with any project for storage or disposal of radioactive material unless the State has determined that its objections have been resolved."

If H.R. 2762 or another bill of like effect is enacted, we would, of course, have no further objection to a "veto" agreement on this basis.

Sincerely yours,

R.F.KELLER

Deputy

Comptroller General
of the United States